COPYRIGHT AND ITS METAPHORS

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INTRODUCTION

Last year, Lawrence Lessig delivered the fifteenth Melville B. Nimmer Memorial Lecture, in which he invoked Professor Nimmer's concern with the balance between copyright protection and the First Amendment right of free speech.[1] Lessig recalled that the Constitution's Framers envisioned copyright as a limited privilege, one balanced against other public interests such as the circulation of knowledge. The Framers' vision was realized in the federal copyright statute of 1790,[2] which established the initial term of copyright at fourteen years, after which copyright protection might be renewed for a second fourteen-year period, but no longer. In setting this term, the Framers were following the English Statute of Anne of 1710,[3] the world's first copyright act, which set the same term and which also presented copyright as a limited privilege. But Lessig warned that the Framers' vision of copyright has become endangered as, increasingly, copyrights have come to be thought of "not as rights that get defined or balanced against other state interests, but as rights that are, like natural property rights, permanent and absolute."[4]

Lessig focused on the recent extension of copyright known as the Sonny Bono Copyright Term Extension Act of 1998,[5] a statute that is now

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* Portions of this Essay draw upon materials originally developed in my *Authors and Owners: The Invention of Copyright* (1993). For their comments and suggestions, I am indebted to Ann Bermingham, Linda Burt, Ted Rose, Robert Rotstein, and, especially, Robert Burt.

1. *See* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1058–89 (2001).

2. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

3. An Act for the Encouragement of Learning, 1709, 8 Ann., c.19 (Eng.).

4. Lessig, *supra* note 1, at 1057.

5. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 101, 108, 203, 301–304).

under review by the U.S. Supreme Court.[6] Under the Sonny Bono Act, the basic term is established as the author's life plus seventy years. The term for anonymous or corporate works is established as ninety-five years from publication or one hundred and twenty years from creation, whichever is shorter. Of course, because the basic term of seventy years only begins to run after an author's death, it is likely that many individually authored works will also be protected for a hundred and twenty years and in some cases longer. Moreover, when U.S. Congresswoman Mary Bono spoke in favor of the act that was named for her late husband, she reported that Sonny Bono actually wanted the term of copyright to last forever. She also reminded Congress of the alternate proposal designed to address the constitutional issue of the limited term, that copyright should last forever less one day.[7]

In his Nimmer lecture, Lessig argued that the change in the culture of copyright, the increasing tendency to think of copyrights as permanent and absolute property rights, has come about in the last thirty years. I agree that there has been an acceleration of change in this period, but it is clear that the roots of the imbalance lie deep in history. In fact, the ink was hardly dry on the Statute of Anne's provision of term limits before the claim was being made that copyright is a natural property right and that protection should last forever.[8] In the eighteenth century, this position was held by such great English lawyers as Lord Mansfield and William Blackstone.[9] And it was echoed by many others in the nineteenth century, including Thomas Noon Talfourd, the parliamentarian who led the charge for the major British term extension of 1842,[10] and Eaton S. Drone, the author of the leading nineteenth-century American treatise on copyright, who maintained that putting a term limit on copyright was the same in principle as putting a term limit on a farmer's right to his orchards and fields.[11]

Lessig addressed the imbalance that has developed in copyright law from the point of view of a constitutional scholar. I am an English professor,

6. *See Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted* 122 S. Ct. 1170 (2002).

7. *See* Lessig, *supra* note 1, at 1065.

8. See, for example, the claims put forward by the booksellers in MORE REASONS HUMBLY OFFER'D TO THE HONOURABLE HOUSE OF COMMONS, FOR THE BILL FOR ENCOURAGING LEARNING, AND SECURING PROPERTY OF COPIES OF BOOKS TO THE RIGHTFUL OWNER (1710), an anonymous pamphlet issued shortly after the literary property bill was amended to include term limits (quoted in MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 44 (1993)).

9. Lord Mansfield delivered his definitive statement on the matter in his opinion in *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769). Blackstone argued for perpetual copyright as an attorney in *Tonson v. Collins*, 96 Eng. Rep. 169 (K.B. 1761).

10. *See generally* THOMAS NOON TALFOURD, A SPEECH DELIVERED BY THOMAS NOON TALFOURD IN THE HOUSE OF COMMONS (1837).

11. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 51 (1879).

not a lawyer. Therefore, I am particularly honored to have been asked to deliver the sixteenth lecture in this prestigious series. Therefore, too, I want to contribute a literary and historical perspective to the ongoing discussion of the balance between copyright protection and other civic interests. Specifically, I propose to examine two metaphors that have long been used to frame thought about the relationship between authors and their writings. One is the idea of a book as a child, and the related concept of authorship as a form of paternity. The other is the idea of a book as real estate, as property no different in principle, as Eaton S. Drone put it, from orchards and fields.

Metaphors are not just ornamental; they structure the way we think about matters and they have consequences. In some respects the paternity and real estate metaphors are incompatible: The former presents a book as a living being, while the latter presents a book as law. Yet I will suggest that they often operate cumulatively, the one reinforcing the claims of the other, and that, taken together, these metaphors have contributed to the tendency to think about copyrights as permanent and absolute property rights. But metaphors are ambiguous and complex creatures—that is why English professors are drawn to them—and I will conclude by suggesting that, examined closely, these same metaphors can help lead to a more balanced, and less absolutist, approach to copyright.

I. AUTHORSHIP AS PATERNITY

The idea of a book as the author's child dates back at least to Plato,[12] but its use as a figure of authorship did not become widespread until the Renaissance, when paternity quickly became the most common figure for expressing the relationship between an author and his works.[13] The spread of the metaphor in the Renaissance is not mysterious; it is during this period that authors and readers began to treat books as expressions of individual personalities, and thus as distinctive and individualized. The following passage from Miguel de Cervantes's prologue to *Don Quixote of La Mancha*,[14] published in 1604, illustrates this point. In this passage, Cervantes apologizes to his readers that Don Quixote is not, as he says, "the handsomest, the liveliest, and the wisest [child] that could be conceived. But,"[15] he explains, "I could not violate Nature's ordinance whereby like engenders like. And so, what could my sterile and uncouth genius beget but the tale of a dry,

12. In *Symposium*, Diotima argues that intellectual children such as the poems begotten by Homer and Hesiod are superior to ordinary human children. PLATO, SYMPOSIUM 76 (Hayden Pellicia ed. & Benjamin Jowett trans., 1996) (1892).

13. I use the masculine pronoun purposely for reasons that will become evident.

14. MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE OF LA MANCHA (Walter Starkie trans., Signet 1964) (1604).

15. *Id.* at 41.

shriveled, whimsical offspring, full of odd fancies such as never entered another's brain."[16]

The concept of literary creation implicit in Cervantes's description of his genius and its offspring is one in which the author impregnates the womb of his brain with an emanation of his own spirit—in this case, a comically dry and shriveled spirit—that eventually becomes his brain child. It is worth noting that this concept of mental generation incorporated an early understanding of the brain as having at its center a special germinating cavity in which ideas were developed. The brain was literally the womb of thought.[17] Furthermore, the Renaissance concept of literary creation incorporated an ancient, and to us peculiar, understanding of biological generation that was derived ultimately from Aristotle and his association of the male principle with spirit and the female principle with matter.[18]

According to this understanding, the male provides the spirit of a child, an immaterial essence that is nurtured in the female womb where it is clothed in matter. A child was thus less the mingling of two parents' characteristics than it was the emanation of one, the father. In other words, like father like son. Because the generation of things in nature and the generation of things in the mind were understood to take place in similar ways, the notion of a brain child was something more than a metaphor. In addition, both biological and intellectual paternity could be understood as reflections of the original divine act of begetting, God's creation of the universe by sending his spirit into the void. Thus, in this period, each of three generative acts—biological generation, authorship, and divine creation—mirrored and implicitly incorporated the others. And in each case the generative act was conceived as essentially parthenogenetic—that is, single-sexed.

The notion of authorship expressed by the brain child metaphor was thus inescapably male. Authorship was paternity. In this way, the concept of authorship was commensurate with the Renaissance concern with blood and lineage and the dynastic principle that, as Cervantes put it, "like engenders like." Nobles beget nobles and peasants beget peasants just as horses beget horses and not cows. The representation of authorship as paternity was also commensurate with the development of the absolutist state in England, France, and Spain, a political form in which the divine, the royal, and the paternal powers were seen as versions of each other.[19] And it was com-

16. *Id.*

17. *See generally* Walter Pagel, *Medieval and Renaissance Contributions to Knowledge of the Brain and Its Function*, *in* THE HISTORY AND PHILOSOPHY OF THE BRAIN AND ITS FUNCTION 95 (F.N.L. Poynter ed., 1958).

18. *See generally* ARISTOTLE, *De Generatione Animalium*, *in* THE BASIC WORKS OF ARISTOTLE 665 (Richard McKeon ed. & Arthur Platt trans., 1941).

19. *E.g.*, SIR ROBERT FILMER, PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 58–84 (C.H. Wilson et al. eds., Blackwell's Political Texts 1949) (1680).

mensurate, too, with the conception of a text as an action, a public deed for which one might be rewarded or punished, rather than a commodity to be bought and sold. Born from the author's brain, a book went forth like Don Quixote, noble or deformed as the case might be, to interact with the world and perhaps to win honor and fortune for its begetter and its begetter's patron.

The concept of a book as an immortal living thing is nicely captured by John Milton in *Aereopagitica*,[20] the tract in which he protests against prepublication censorship. A good book, Milton says, is "the precious lifeblood of a master spirit, embalmed and treasured up on purpose to a life beyond life," and we must be wary, he says, "how we spill that seasoned life of man preserved and stored up in books."[21] Such a sacramental concept of a book as the essence of an individual does not perfectly fit the kind of commercial society that was developing even in Milton's day, when books were bought and sold as ordinary commodities. But Milton's world was still on the cusp; it was not yet the advanced marketplace society of the later seventeenth and early eighteenth centuries, the civic society that would witness the emergence of the institution of copyright along with the spread of literacy, the growth of the reading public, and the transformation of authorship into a legitimate profession in which one could earn a living without depending on aristocratic patronage.

The imperfect fit between the paternity trope and the new marketplace society is clear in a periodical essay that Daniel Defoe published in his journal *The Review*,[22] as part of his effort to lobby for the proposed bill to protect literary property, the bill that would become the Statute of Anne. Drawing on the version of the child metaphor embedded in the word *plagiary*, derived from the Latin for kidnapping, Defoe developed the idea of literary theft as a kind of child-stealing:

> A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, 'tis as much his own, as his Wife and Children are his own—But behold in this Christian Nation, these Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them.[23]

Note the idyll of patriarchal domesticity, the author as master of his household, which is disrupted as the text veers in the direction of a romantic

20. JOHN MILTON, *Areopagitica*, *in* JOHN MILTON (Stephen Orgel et al. eds., Oxford Univ. Press 1991) (1644).

21. *Id.* at 240.

22. Daniel Defoe, *Miscellanea*, DEFOE'S REVIEW 515, 515–16 (1710), *reprinted in* 16 DEFOE'S REVIEW 515 (Arthur Wellesley Secord ed., 1938).

23. *Id.*

adventure with biblical and religious overtones: "But behold in this Christian Nation, these Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them." It is unclear whether these infidel thieves are Turks, Moors, or perhaps American savages in a story of violence in the New World. In any event, the bereft father is without recourse; no power exists capable of redeeming his lost children from captivity. The colorfulness of Defoe's adventure story perhaps distracts attention from the less violent form of alienation that is implied at the start of the passage, in which Defoe indicates that the author may sell his book, which then becomes the property of the purchaser. If pirates are faithless child-stealers, what are fathers who sell their children for profit? One's family is one's own, but does it follow that children are therefore freely vendible commodities, mere property like any other? Perhaps one might argue that Defoe is alluding to the fact that poor parents did sometimes sell their children into prostitution or other labor. If so, the passage about selling the brat of one's brain might be seen as an anticipation of Jonathan Swift's *A Modest Proposal*,[24] the satiric pamphlet which suggested that the Irish could turn a profit by selling their excess children for food.[25] But there is little evidence that Defoe is being ironic or that he means to draw attention to the potentially scandalous implications of his idea. Instead, he is merely developing the narrative potential latent in the paternity metaphor and using it to make his argument for the literary property bill.

II. THE BOOK AS REAL ESTATE

Nevertheless, as the Defoe passage suggests, the commodification of texts and the emergence of copyright called for a remetaphorization of the author's relationship to his work. Thus, as one ancient tradition likens books to babies, another, also going back at least as far as Plato, likens writing to agriculture and specifically to plowing, with the writing implement or stylus being a kind of plow by which one makes furrows on the field of a wax tablet.[26] Moreover, the conceit of the mind as a field is as old as pastoral poetry, and in the Middle Ages, under the influence of the evangelical trope of the word of God as a seed,[27] the author was often represented as a sower of seeds.

24. JONATHAN SWIFT, A MODEST PROPOSAL AND OTHER SATIRICAL WORKS (Dover 1995) (1729).

25. *Id.* at 52.

26. *See* ERNST ROBERT CURTIUS, EUROPEAN LITERATURE AND THE LATIN MIDDLE AGES 313–14 (Williard R. Trask trans., Harper & Row Publishers 1963) (1953).

27. *See, e.g.*, *Luke* 8:5–8.

Any one—or perhaps all—of these ancient tropes might be cited as precedent for the conceit that Joseph Addison developed in an essay that he, too, wrote in support of the proposed literary property bill.[28] In this essay, Addison presented an amusing sketch of a recently deceased hack writer named Tom, who treated his brain as a kind of estate from which, like a farmer, he brought forth produce that varied according to the season. In winter Tom produced accounts of murders and accidents, in spring he wrote about monsters and prodigies. But his best season was the summer when the fighting in Europe resumed and he wrote about the ongoing War of the Spanish Succession. "Poor Tom!" Addison exclaims, "[H]e always looked well after a battle" and was clearly "fatter in a fighting Year."[29] Addison's point was that a writer such as Tom, or even Addison himself, depended upon his intellectual estate for his livelihood no less than others did on their lands.

Addison's representation of the author as a property owner carrying the fruits of his labor to market is an explicitly commercial conceit that is plainly more commensurate with a marketplace society than the brain child trope. It also fit well with the rhetoric of printers and booksellers who were accustomed to treating printing rights as perpetual properties within the rules of the Stationers' Company, the powerful guild that regulated the book trade.[30] Various developments at the end of the seventeenth century had led to the erosion of the Stationers' Company's authority, and therefore the printers and booksellers, as well as the authors, were pressing for a literary property statute.[31] They did so using language that claimed their literary properties were equivalent to houses and lands. The stationers were pleased with the passage of the Statute of Anne, but they were not pleased by the term limits that the statute introduced.[32] Copyrights, they protested, were indeed estates and should be treated as such.[33] Underlying their argument was John Locke's theory of property and the notion that, through labor, an individual might convert the common ground of nature into private property. Authors, they argued, created literary properties through their labor, and when they sold their works to booksellers, the transactions were the same as transactions in real estate.[34]

28. *See* JOSEPH ADDISON, Dec. 1, 1709, *reprinted in* 2 WORKS OF JOSEPH ADDISON 248 (Richard Hurd ed., George Bell & Sons 1903).

29. *Id.* at 249.

30. *See generally* CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403–1959 (1960).

31. *See* ROSE, *supra* note 8, at 34–36.

32. *Id.* at 44.

33. *Id.*

34. *Id.*

In the course of the eighteenth century, the real estate metaphor became nearly as commonplace as the paternity trope. It passed into common literary usage through such writers as Henry Fielding[35] and Arthur Murphy,[36] who played with the notion of the commonwealth of letters as an actual territory, and it passed into legal discourse through its use by, among others, William Blackstone, who compared a book to the private grounds of an estate.[37] By purchasing a copy of a book, a reader in effect purchased a key to unlock the author's grounds, allowing the reader access to admire and criticize the author's property. But the key only granted the reader access; it did not convey the right to the estate itself nor the right to reproduce the key and sell copies to others.

III. THE UNCONSCIOUS OF COPYRIGHT

The real estate metaphor neatly assimilated the emergent institution of copyright to Lockean possessive individualism, the dominant political ideology of the eighteenth century. Moreover, it provided a reassuring sense of weight and tangibility to the otherwise elusive and intangible concept of literary property. Because the rules for the ownership, use, and transfer of land were well established, the real estate metaphor implied that it would be possible to apply organized principles to the abstract domain of copyright. Precisely because of this utility, the metaphor remains pervasive, functioning today as part of what might be called the unconscious of copyright law—that is, as the conceptual model for copyright. Thus, copyright's grant of exclusive rights to the proprietor parallels a landowner's legal right to exclude others from his land. Infringement is treated as similar to trespass. Works that are not protected are said to be in the public domain, a concept also derived from land law. And what copyright relies on in place of physical borders to draw lines among the various parcels in private ownership is, as Jessica Litman suggests, the notion of originality.[38]

This is not to say that the paternity metaphor has disappeared. The literal analogy between intellectual and biological generation has been forgotten by everyone except a few scholars, but writers still speak readily of brain children, and the notion of literary creation as paternity is, like the notion of literary property as real estate, part of the unconscious of copyright law. Thus, an author's right to be recognized as the creator of a work, the

35. *See* HENRY FIELDING, THE HISTORY OF TOM JONES 620–21 (Fredson Bowers ed., Wesleyan Univ. Press 1975) (1756).

36. *See* Arthur Murphy, *Number IV*, The GRAY'S-INN JOURNAL, Nov. 11, 1752, *reprinted in* 5 THE WORKS OF ARTHUR MURPHY, ESQ. 29, 29–37 (T. Cadell 1786).

37. *See* Tonson v. Collins, 96 Eng. Rep. 180, 188 (K.B. 1761).

38. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990).

right to insist upon his or her name being attached to the work when it is published, is known as the right of paternity. And the paternity metaphor readily surfaces whenever copyright has to be justified. The classic comment of Professor Nathaniel Shaler of Harvard, a nineteenth-century scientist, is quoted to the present day. "The man who brings out of the nothingness some child of his thought," Shaler said, "has rights therein which cannot belong to any other sort of property."[39]

Like the real estate trope, the paternity metaphor thus persists because it remains useful. It provides a convincing way of grounding literary property in the author. The two tropes thus complement each other. The paternity metaphor underwrites the system as a whole, while the real estate metaphor objectifies and reifies the author's production and allows it to be treated as a commodity. Each trope in its own way contributes to the tendency to think of copyrights as permanent and absolute property rights. The paternity metaphor does this by invoking the godlike notion of creation out of nothingness. The real estate metaphor does this by analogizing copyright to land which, of course, persists forever. The two tropes converge when the argument is made—as it often is—that an author's property right is even more absolute than that of the usual landed proprietor, because the author does not merely discover or develop his land: He creates it from nothing.[40]

Yet the paternity and real estate metaphors are in some respects incompatible. The former represents copyright as something distinctive and personal, an extension of the author's self in the form of a child. The latter represents copyright as objective and impersonal, a mere commodity like any other. The difficulty is that the unconscious of copyright is a mixed metaphor. How is one to negotiate the gap between creativity and commerce, between the notion that copyright is grounded in personhood and the need for a property law to regulate trade in vendible works? This is a problem that has always been latent in copyright but that has grown increasingly obvious over the years as the subject matter of copyright has expanded to include not only works of high culture or high authorship, such as books and poems, but also such works as TV advertisements, game shows, and of course computer

39. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y U.S. AM. 421, 426 (1983) (quoting NATHAN SHALER, CONSIDERATIONS ON THE NATURE OF INTELLECTUAL PROPERTY AND ITS IMPORTANCE TO THE STATE 1, 9 (1878)).

40. A very early example occurs in an anonymous pamphlet published at a time when the booksellers were lobbying for an extension of the fourteen-year copyright term. After arguing that an author has the same rights as a landholder, the pamphleteer goes on to assert that in many respects the author's right is greater than that of an ordinary landowner, "for, in some Cases, he may be said rather to create, than to discover or plant his Land; and it cannot be said, that an Author's Work was ever common, as the Earth originally was to all the World." *A Letter from an Author to a Member of Parliament Occasioned by a Late Letter Concerning the Bill Now Depending in the House of Commons, reprinted in* THE ENGLISH BOOK TRADE 1660–1853 (Stephen Parks ed., Garland Pub. 1975) (1735).

programs. From the point of view of copyright's metaphors, this is not so much a logical problem as it is a rhetorical problem. That is, the issue is not truth so much as persuasion. A successful solution will be one that is persuasive. And a persuasive solution will be one that works because it tells us what we already know. The solution should thus have roots in the metaphorical patterns that already exist in the discourse of copyright.

A common solution has been to assimilate even very mundane commodities to the privileged language of creativity. For example, in a famous early twentieth-century case,[41] Justice Oliver Wendell Holmes justified the extension of copyright protection to a group of circus advertising posters by invoking Rembrandt, Velasquez, and Whistler, among other artists. The posters were not masterpieces, Holmes said, but nonetheless, like the works of the great masters, they represented the personal reaction of an individual upon nature.[42] "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."[43] In this way, Holmes presented the posters as if they were distant cousins of Rembrandts and Whistlers. Sometimes this kind of rhetorical move is performed with disarming wit and irony, as it is in the amusing title of a piece concerned with the protection of computer programs that was published in the 1987 issue of the *UCLA Law Review* devoted to honoring Melville B. Nimmer, memorably titled *Silicon Epics and Binary Bards*.[44]

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[45] a landmark decision in 1991, the U.S. Supreme Court reasserted the importance of creativity to copyright doctrine. *Feist* concerned the question of whether the white pages of a telephone directory were protectible by copyright. The plaintiff, a Kansas telephone company that printed a local directory for its subscribers, sued Feist, a publisher specializing in wide-area telephone directories, who had extracted listings from the plaintiff's directory without its consent.[46] Was the plaintiff's directory protectible? More specifically, did its labor in compiling the directory, together with the act of putting the entries in alphabetical order, create a copyrightable work? The issue was important, among other reasons, because it had implications for whether databases could be protected by copyright.

41. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

42. *Id.* at 250.

43. *Id.*

44. Anthony L. Clapes et al., *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. REV. 1493 (1987).

45. 499 U.S. 340 (1991).

46. *Id.* at 343.

The Court held that the white pages of a telephone directory are not copyrightable because they do not meet the test of originality:[47]

> The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.[48]

The language of the decision, written by Justice Sandra Day O'Connor, is contradictory. On the one hand, O'Connor hints at the quantitative language of commercial weights and measures when she speaks of levels and amounts: "[T]he requisite level of creativity is extremely low; even a slight amount will suffice." On the other, she invokes a metaphor, "some creative spark," that if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself. What, after all, passes between the outstretched forefinger of Michelangelo's God and his Adam but, precisely, "some creative spark?" Justice O'Connor's metaphor carries us back to justifications of copyright such as Nathaniel Shaler's child of thought, to Renaissance conceptions of the likeness between divine creation and intellectual and biological generation, and to the rich complex of associations embedded in the paternity metaphor.

Of course, like all tropes, the paternity and real estate metaphors are fictions. The writing of a book is not really like fathering a child. A literary work is not really like a parcel of real estate. Indeed, copyrights have never been aptly characterized as real estate because copyright has never been perpetual. The real estate metaphor more nearly represents wishful thinking than it does reality. Again and again in the last three hundred years, perpetual copyright has been rejected.[49] But again and again the term of copyright has been extended.[50] The fact that the real estate metaphor forms part of

47. *Id.* at 362–64.

48. *Id.* at 345 (citations omitted).

49. It was rejected by Parliament in the legislative process that produced the Statute of Anne, by the House of Lords in *Donaldsons v. Becket*, 98 Eng. Rep. 257, 258 (K.B. 1774), and in the United States in *Wheaton v. Peters*, 33 U.S. 591, 698 (1834). One might quibble here that the issue in *Wheaton* as in *Donaldson* was not perpetuity but the status of the common law right, but that ultimately amounts to the same thing. To affirm common law right would be to affirm perpetuity.

50. In the last forty years, the U.S. copyright term has been extended eleven times. *See* Lessig, *supra* note 1, at 1065. Nine of these were brief extensions of subsisting copyrights made in anticipation of the major change in term enacted in 1976. The Sonny Bono Act is the eleventh. *Id.* at 1065.

the unconscious of copyright, and is built into the way we think about copyright, will surely contribute to further extensions in the future.

The prospect is thus not that perpetual copyright will be enacted as a whole but that it will be enacted in pieces by successive extensions of the term. Nonetheless, the real estate metaphor can also be mobilized as part of an argument against further extensions as it has been, for example, by James Boyle.[51] Boyle compares recent developments in copyright law—both term extension and the erosion of fair use—to the English land enclosures of the early modern period, and he suggests that perhaps we can find a model for political action in the environmental movement of the mid-twentieth century. Until there was a public movement to bring it to consciousness, the very concept of the environment remained effectively invisible. Likewise, Boyle argues, a new public movement is needed to make visible and protect the intellectual commons.

Boyle's argument suggests how the real estate metaphor can be made to yield new meanings by being used critically. What about the paternity metaphor? The problematic notion that children might be treated as commodities has been latent in the paternity metaphor since the time of Defoe. But although the notion of the brain child has been invoked to justify copyright, its implications have never, to my knowledge, been taken seriously. Or so I would have said until about ten years ago when an extraordinary case, *Johnson v. Calvert*,[52] emerged in the California courts. This was not a copyright case, but a case involving a real baby and conflicting claims of two women, each of whom maintained that she was the child's mother.

Mark and Crispina Calvert were a married couple who wanted to have a child.[53] Although Crispina had had a hysterectomy, she remained capable of producing eggs, and the Calverts entered into a standard surrogacy agreement with Anna Johnson.[54] Crispina's eggs were surgically removed, fertilized in vitro by Mark Calvert's sperm, and then implanted in Anna Johnson's womb.[55] But relations between the Calverts and Mrs. Johnson broke down during the course of the pregnancy, and Mrs. Johnson threatened to keep the baby.[56] The Calverts responded with a suit seeking a

51. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS. (forthcoming 2002) (draft available at http://www.james-boyle.com).

52. 5 Cal. 4th 84 (1993). I discuss this case at greater length in *Mothers and Authors: Johnson v. Calvert and the New Children of Our Imaginations*, 22 CRITICAL INQUIRY 613 (1996).

53. *Johnson*, 5 Cal. 4th at 87.

54. *Id.*

55. *Id.*

56. *Id.* at 87–88.

declaration that they were the legal parents of the unborn child.[57] Mrs. Johnson countered with a suit asking to be declared the child's mother.[58]

How was a court to choose between the claims of the woman who provided the ovum and the woman who carried the baby to term? Which woman should be declared the child's natural mother? Both the superior court and the appellate court decided in favor of Mrs. Calvert on genetic grounds, but the California Supreme Court found Mrs. Johnson's biological claims equally compelling.[59] Faced with a biological conundrum, the court shifted its inquiry from the physical to the mental realm. Which woman had first intended to bring the child into the world? That is, which woman was the originator of the concept, the mental concept, of the child? On these grounds the majority awarded the baby to Mrs. Calvert, who had contracted with Mrs. Johnson to bear the child. It was not, however, a unanimous decision. Justice Joyce Kennard, the one woman on the court at the time, dissented, and in her dissent she made explicit the nature of the court's reasoning. The majority, she said, was relying on the paradigm of copyright law—mental conception—and this, she objected, amounted to the treatment of a human being as property.[60] Custody, she maintained, had to be determined by taking into account the interests of the child.[61]

Justice Kennard's opinion asks that we focus our attention on the child and its future. The baby boy at the heart of the case will eventually become a man, a free adult with a life of his own. Presumably he will marry and will himself beget children. Life will go on. Likewise, as Milton understood, literary works have a kind of life. Moreover, literary works are themselves productive of further works. Poems, it is often said, beget poems. In *Johnson* the brain child metaphor crossed the boundary from art to life. Perhaps if we carry *Johnson*'s implications back across the boundary from life to art, this case can become a tool for thinking about copyright. What *Johnson* suggests is that we should consider the interests of the child as well as those of the begetter.

The original terms of copyright protection set by the Statute of Anne in 1710 and copied in the American statute of 1790 encourage such a consideration. These statutes provided for a fourteen-year term with the possibility of renewal for another fourteen if the author was still living. In addition, the Statute of Anne provided a twenty-one year limit for works that were already in print. The terms, which were modeled on the Jacobean

57. *Id.* at 88.
58. *Id.*
59. *Id.*
60. *Id.* at 102 (Kennard, J., dissenting).
61. *Id.* at 103.

Statute of Monopolies,[62] probably relate to ancient formulas having to do with emancipation. Seven years is the traditional term of an apprenticeship, a formula that is as old as the Book of Genesis.[63] Fourteen is twice seven. Twenty-one, the traditional age of majority, is three times seven. Implicit in the original copyright term, then, was the notion that, like a child, a protected work would eventually be emancipated. What has happened over the years, however, is that the copyright term has been extended again and again until now, under the Sonny Bono Act, it may extend for a hundred and twenty years or even more.[64] This is no longer apprenticeship but slavery. Why should the children, grandchildren, and even great-grandchildren of the author's imagination remain bound for so long?

The paternity metaphor is conventionally used to describe the creation of a literary work and there the story ends. But life does not end at birth and the paternity metaphor renders invisible the fact that literary generation is an ongoing, serial process. The paternity metaphor also renders invisible other aspects of generation. It does so in the real-life case of *Johnson v. Calvert*, as well as in the realm of art. The majority in *Johnson* based their decision on Crispina Calvert's mental conception, her idea to bring a child into the world. But making the notion of the brain child dispositive obscured the complex material circumstances that brought this child into the world. Many people contributed to the creation of this child, including the Calverts who provided the genetic materials, the fertility experts who performed the in vitro fertilization, and Mrs. Johnson who nurtured the baby for nine months in her womb. The majority treated the child as if it were indeed sprung from Mrs. Calvert's brain.

Likewise, the paternity metaphor obscures the fact that literary works are the products of complex collaborations in which many individuals are involved, including authors, editors, colleagues, friends, and previous authors, and that literary works are produced through acts of generation that involve the adaptation and transformation of materials from the literary gene pool rather than creation out of nothingness. Although the literal analogy between intellectual and biological creation has been forgotten, we still treat the act of literary creation as if it were parthenogenetic, as if a work were really born like Athena from Zeus's head. The paternity trope was commensurate with the absolutist state in which the divine, the royal, and the paternal powers were seen as versions of each other. But this is not the world that we live in today. The paternity metaphor is patriarchal and

62. An Act Concerning Monopolies and Dispensations with Penall Lawes and the Forefeyture thereof, 21 Jac. I, c. 3. (Eng. 1623).

63. Jacob indentures himself to Laban for seven years to win the hand of Rachel. *Genesis* 29:18.

64. *See* 17 U.S.C. § 302(b)–(c) (Supp. 2000).

obsolete. More significantly, the entire conception of authorship embedded in the paternity trope is obsolete. We need a better biology of authorship, one that will take into account not only the collaborative nature of biological generation, but also modern genetics and our understanding of the repetitions and variations that relate the individual to the human gene pool at large. And because literary works are, like people, fruitful, we need to be certain that they will be returned to generative circulation before their powers become, as Cervantes jokingly wrote, "dry" and "shriveled" with age.

Conclusion

I have been exploring some of the implications of the unconscious of copyright. Anyone who wishes is free to dismiss this line of thought as mere play with metaphors. But, as *Johnson v. Calvert* illustrates, metaphors have consequences. Both the paternity and the real estate tropes make it difficult to see that copyright involves more than the relationship between an author and a work. They disguise the fact that it is generally publishers or other corporate entities who are the proprietors of copyrights, and they also disguise the fact that the public at large has a vital interest in copyright, as the constitutional Framers understood. Moreover, as I have suggested, these metaphors have contributed to the tendency to think about copyrights as permanent and absolute property rights.

How are we to deal with the influence that these metaphors continue to exert? The issue of how we think about copyright is as much a matter of rhetoric as it is of logic. Paternity and property are very old metaphors, and they are deeply embedded in the way we think about ourselves as well as the way we think about copyright. We cannot simply escape from these metaphors because we cannot escape from history and from ourselves. A persuasive solution to the problems our metaphors pose will be one that does not simply reject the old tropes but finds new ways to understand them. In this manner perhaps we can recover the balanced view of copyright that, as Lessig reminded us last year, Melville B. Nimmer cared about deeply.

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